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*Attorneys for Plaintiff Cisco Systems, Inc.*

**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

CISCO SYSTEMS, INC.,

Plaintiff,

vs.

ARISTA NETWORKS, INC.,

Defendant.

CASE NO. 5:14-cv-5344-BLF

**CISCO'S OBJECTIONS TO ARISTA'S  
12/2/2016 TRIAL EXHIBITS AND  
DEMONSTRATIVES**

Dep't: Courtroom 3, 5<sup>th</sup> Floor  
Judge: Hon. Beth Labson Freeman

1 Cisco objects as follows to Arista's December 2 trial exhibits and demonstratives.

2 The sole witness Arista has disclosed for December 2 is Ken Duda, Arista's CTO. Arista  
3 proposes to use certain **demonstratives** in the course of its examination of Mr. Duda. These  
4 slides are largely repetitive of slides Arista presented in its opening argument. Cisco objects to  
5 slides 9, 11, 14, 18, and 20 as improperly argumentative and self-serving and also containing  
6 hearsay. Slide 10 is irrelevant to the case and more unfairly prejudicial than probative,  
7 particularly in light of Arista's repeated objections to even stray references to source code in the  
8 exhibits and testimony presented in Cisco's case-in-chief. *See, e.g.*, ECF 694 at 1.

9 Arista has also disclosed a number of proposed exhibits which are plainly inadmissible  
10 hearsay. Exhibits **5416** and **8199** are media publications. "It is axiomatic to state that newspaper  
11 articles are by their very nature hearsay evidence and are thus inadmissible if offered to prove the  
12 truth of the matter asserted." *AMFS LLC v. UPS*, 105 F. Supp. 3d 1061, 1070 (C.D. Cal. 2015).  
13 None of these exhibits fall within an exception to the hearsay rule; the fact of their publication has  
14 no bearing on this trial.<sup>1</sup> To the contrary, all of the press material collected in these exhibits  
15 purports to provide technological or financial analysis which, were the authors available, Cisco  
16 would thoroughly cross examine.

17 The rule against hearsay further excludes the large number of Arista-authored  
18 presentations, papers, and press releases which have been designated. Earlier in this case, Cisco  
19 sought to introduce a PowerPoint presentation through its author; Arista objected on hearsay  
20 grounds, the Court sustained the objection, and Cisco was not able to introduce the evidence. *See*  
21 ECF 687 at 273. Now Arista seeks to introduce a slew of "marketing puff piece[s]." *Id.* Exhibits  
22 **6423**, **7357**, and **7408** and are white papers Arista published for a wide audience; exhibits **7736**,  
23 **7740**, **7769**, **7890**, **7892**, and **7894** are presentations Arista used to promote its products and itself;  
24 exhibit **8206** is a self-serving Arista press release. All of these exhibits are "laudatory and self-  
25 congratulatory" marketing fluff of the kind the Court has already ruled is excluded under the  
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27 <sup>1</sup> Any suggestion that the fact of publication is relevant to estoppel, one of the topics  
28 purported to be amongst the substance of Mr. Duda's testimony, ECF 593-2 at 2, is of course  
precluded by the Court's determination that estoppel is an equitable defense not tried to the jury.

1 hearsay rule. *Id.*; *see, e.g.* Ex. 7357 at 947 (“EOS is a robust, programmable and innovative  
 2 operating system”); Ex. 7892 at 655 (“True Leadership”); Ex. 7894 at 033 (“Why Arista switches  
 3 for Hadoop?”); *see also* Ex. 7769 (describing efforts to write “a white paper describing features and  
 4 benefits of Arastra EOS”). All were intended for external audiences and none was “relied upon by  
 5 [Arista] in the performance of its functions,” and thus none carries the assurance of accuracy that  
 6 justifies the business records exception. *City of Long Beach v. Standard Oil Co. of Cal.*, 46 F.3d  
 7 929, 937 (9th Cir. 1995); *see also* Fed. R. Evid. 803(6).

8 The internal Arista emails that make up exhibits 536, 6515, 7744 (hearsay within hearsay),  
 9 7748 (same), 7769, 7788 (again), 7812, 7869, 7873, 7876, and 9069 are all hearsay. There is no  
 10 indication on the face of these documents that they were kept and approved pursuant to a  
 11 formalized procedure; instead, they are informal back-and-forth communication which carry no  
 12 indicia of reliability. “In the Ninth Circuit, emails are not automatically admissible under the  
 13 business records exception to the hearsay rule.” *Venture Corp. Ltd. v. Barrett*, 2015 WL 2088999,  
 14 \*2 (N.D. Cal. May 5, 2015). The most formal of the emails, Ex. 7788, is a record of a conference  
 15 call and as such is hearsay within hearsay with no recourse to the business records exception.

16 Another set of documents inadmissible as hearsay are those that purport to instruct Arista  
 17 employees in matters of conduct and ethics. Exhibits 7715, 7836, 7837, 9067, 9068, and 9069 all  
 18 appear to be materials Mr. Duda or an unknown Arista employee created to instruct other Arista  
 19 employees in proper standards. Besides the fact that these documents are rife with self-serving  
 20 statements that should not go to the jury through an out-of-court declarant, *see, e.g.*, Ex. 9067  
 21 (“Do the right thing”); 9068 (“Arista is a great place to work”), they are also precisely analogous  
 22 to the PowerPoint Mr. Remaker authored for internal presentation to Cisco employees. The Court  
 23 should exclude Arista’s internal and aspirational employee guidance to the same extent it excluded  
 24 Mr. Remaker’s presentation.

25 Exhibits 6506, 6515, 7744, 7812, 7869, 7873, and 7876 all either consist of or contain  
 26 advertising materials from Arista’s competitors. For all of the reasons discussed above, such  
 27 materials are, again, inadmissible hearsay to the extent they are offered for the truth of the matters  
 28 asserted. Because Arista has not identified any alternative purposes for these exhibits or any

1 others, and because the topics Mr. Duda's testimony is purported to cover, *see* ECF 593-2 at 2  
 2 ("Founding of Arista; development of EOS; accused CLI elements; fair use; estoppel; copyright  
 3 misuse. Documents on the exhibit list that were either authored or received by him."), do not  
 4 indicate such purposes, Cisco object to their admission.

5 Finally, the only description Arista provides of exhibits 5594 and 5595 is that they are  
 6 "physical prototypes." Without access to these items, Cisco cannot evaluate whether they are  
 7 appropriate evidence. Cisco reserves the right to inspect these exhibits and make additional  
 8 objections.

9 Dated: December 1, 2016

Respectfully submitted,

10 /s/ John M. Neukom

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